

REMARKS

In the Office Action dated July 26, 2004, claim 39 was rejected under 35 U.S.C. § 101 as being directed toward non-statutory subject matter; claims 21-39 were rejected under 35 U.S.C. § 112, second paragraph, as being indefinite based upon the term "a closely defined large-scale structure"; claims 21-24 and 32-39 were rejected under 35 U.S.C. § 102(a) as being anticipated by PCT Publication No. WO0109874A1 to Mester; and claims 21-39 were rejected under 35 U.S.C. § 103(a) as being obvious over U.S. Patent No. 5,403,263 to Rogers in view of the Mester reference.

Applicant has canceled claim 39 thereby overcoming the rejection under 35 U.S.C. § 101.

Claim 21 has been amended to omit the limitation of "the entire programme is, on a detailed level, apparently random, but has a closely defined large-scale structure". This omitted limitation has been replaced with the limitation of "the phases have a pre-defined sequential order within the audio programme" to increase the clarity of the claim. As is described on page 8 of the specification and shown in Figs. 2-6, this replacement limitation is only a clarification of the omitted limitation, and does not narrow the scope of claim 21 as amended.

Claim 21 was rejected as anticipated by the Mester reference. As indicated above, Applicant has amended claim 21 to clarify the scope of the claim. While the claim was not amended to overcome the Mester reference, Applicant addresses the allowability of amended claim 21 over the Mester Reference.

To anticipate a claim, a reference must disclose each and every element of the claim. (See MPEP § 2131.01.) The Mester reference, however, fails to teach or disclose every limitation of amended claim 21. In particular, claim 21 includes the limitations of "the phases have a pre-defined sequential order within the audio programme" and "each phase is generated by selecting at random a plurality of audio sequences from a

repertoire of audio sequences". The Mester reference does not teach generating an audio programme in this manner. Rather, the Mester reference teaches generating the audio programme by selecting sections (phases) "in succession according to a random factor." (Mester, at 3.) Audio materials associated with each section are sorted into groups, and the audio programme is generated by selecting one group "at random in the selected section". The generation of this audio programme is therefore an entirely random process, both for the selection of the section (phase) and for the selection of the group within the selected section. The Mester reference does not teach selecting the section (phase) using "a pre-defined sequential order", and then randomly selecting from among the audio sequences associated with the selected section (phase). For this reason, the Mester reference does not anticipate amended claim 21.

Claims 22-24 and 32-38 were also rejected as anticipated by the Mester reference. Each of these claims ultimately depends from amended claim 21. For the same reason the Mester reference does not anticipate amended claim 21, it also does not anticipate claims 22-24 and 32-38.

Claims 21-38 were also rejected as obvious over the Rogers reference in view of the Mester reference. The MPEP sets the following standard for establishing a *prima facie* case of obviousness:

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991).

MPEP § 2143. As is detailed below, the combination of the Rogers and Mester references does not disclose all the limitations of the rejected claims. As such, this combination does not establish a *prima facie* case of obviousness over the rejected claims.

As discussed above, the Mester reference does not teach or disclose the limitations found in amended claim 21 of “the phases have a pre-defined sequential order within the audio programme” and “each phase is generated by selecting at random a plurality of audio sequences from a repertoire of audio sequences”. The Rogers reference also does not teach or disclose these limitations.

The Rogers reference discloses use of an audio program recorded *on a cassette tape* to help a patient to relax. The audio program is necessarily pre-recorded and plays the pre-recorded audio in the sequence of the original recording. The audio tape cannot be modified to randomly select the sequence of play back, whether at the phase level or at the audio sequence level. Even if the cassette tape player of the Rogers reference is replaced with equipment that includes more modern digital technology, the Rogers reference still does not teach or disclose generating the audio program by selecting the phase using “a pre-defined sequential order”, and then randomly selecting from among the audio sequences associated with the selected phase. Where neither the Rogers reference nor the Mester reference teach these same limitations, the combination of the two references does not establish a *prima facie* case of obviousness over amended claim 21.

Claims 22-38 were also rejected as obvious over the Rogers reference in view of the Mester reference. Each of these claims ultimately depends from amended claim 21. As such, the Mester reference also does not establish a *prima facie* case of obviousness over claims 22-24 and 32-38

Applicant has added new claims 40-45 to the present application. Claims 40 and 45 are novel for at least the limitation of pre-determining the length of the audio

programme. Claims 41-44 are novel for at least the combination of the limitations of "the phases being produced in a pre-defined sequential order" and "randomly selecting audio sequences from the phase repertoire associated with each respective phase".

In view of the foregoing, Applicant requests reconsideration of the rejections.

Respectfully submitted,

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DATE: June 1, 2005

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